No. 15,998

United States Court of Appeals
For the Ninth Circuit

JAMES R. YOST,
Appellant,

vs.

ALBERTA G. MORROW,
Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This action was brought by the Appellant, a resident of the State of Oregon, against one C. A. Butcher and the Appellee Morrow, to foreclose a chattel mortgage on hay, grain and other feed or in the alternative if it should be found that none of the mortgaged property was still in existence for a judgment on the promissory note secured by the mortgage. The trial was had before the Court sitting without a jury and at the close of the evidence the Court granted a dismissal as to the Defendant and Appellee Morrow and rendered judgment in favor of the Appellant and against the said Butcher for the amount due upon the note sued upon. This appeal is prosecuted from the portion of the judgment dismissing the action as to the Appellee Morrow.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court: Original jurisdiction over this action was based solely upon diversity of citizenship and was conferred upon the trial Court by 28 U.S.C. Section 1332.

Jurisdiction of this Court to review the judgment upon appeal: 28 U.S.C. Section 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1294 provides, in part, that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

The pleadings necessary to show the existence of jurisdiction are the Complaint (R. 3 to 10) and the Answer filed jointly by the Appellee and other Defendants (R. 18 to 22).

The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgment in question on appeal have been heretofore alluded to, and will be given more detailed consideration in the following summary and statement of the case.

STATEMENT OF THE CASE.

The Complaint of the Plaintiff-Appellant (R. 3 to 10) is a simple Complaint for the foreclosure of a

Chattel Mortgage against the Appellee and one Butcher alleging, however, that the mortgaged property may no longer be in existence and if such be found to be the case a judgment upon the note secured by the Chattel Mortgage is sought against both of the makers thereof.

The Complaint in paragraphs II and III (R. 3, 4 and 5) alleges the execution and delivery of the note and chattel mortgage by the Appellee Morrow and the Defendant Butcher for a valuable consideration. The Answer and Cross-Complaint (R. 18 to 22) admits the allegations contained in paragraphs II, III and IV of the Complaint, in admitting that the note and mortgage were executed *for a valuable consideration.* The Answer impleads as a counterclaim a fraudulent breach of a written contract for the wintering of livestock (R. 18 to 22; R. 23 to 27). The Complaint further alleges and the Answer admits the domicile of the parties showing diversity of citizenship (R. 3, 18). There was admitted in evidence plaintiff's Exhibits 1 and 2, being the note and mortgage in question (R. 42); there was also admitted Exhibits 3 and 4, being the checks evidencing the payment to the Defendant Butcher of the amount of money making up the mortgage. The only reference to the note in question is found as follows:

Appellant testified as follows:

> "I made the checks to Butcher for the feed that he was to furnish that is the $6500 was a loan that I took in advance of this contract of Mr. Butcher, therefore, I made the check to him. The

$800.00 was a payment on the contract. *Mrs. Morrow was asked to sign the notes to secure the mortgage.*

Q. Did she sign the note?

A. Yes, she did." (R. 44).

On cross-examination the Appellant testified that he did not discuss the making of the note and mortgage with the Appellee. He merely requested her signature on the note; that he made this request of the Defendant Butcher for the reason that there wasn't sufficient security and because Mrs. Morrow owned the land upon which the mortgaged feed was raised (R. 52). Further the Appellant testified that Mrs. Morrow was never talked to at all about the contract between Butcher and the Appellant and that all the Appellant did was to insist that she countersigned on the note before he made the loan (R. 60 and 61). The Defendant Butcher further testified that the Appellant told him that before Butcher would get his loan the Appellant had to have the note and mortgage and that he had to have Butcher's mother-in-law, Mrs. Alberta G. Morrow, sign the note (R. 86). Mrs. Morrow testified that she did not talk with the Appellant at the time she signed the note and that she signed the note at Nyssa, Oregon (R. 135). She further testified that she was told by the Appellant's attorney that the reason the Appellant wanted her to sign the mortgage was that she owned the property wherein the mortgaged feed was raised (R. 136 and 137). She was also asked by her counsel:

"Did you ever receive any money from Mr. Yost on this?" (meaning the note and mortgage)

to which the Plaintiff objected upon the ground that it was immaterial and the objection was overruled by the Court and Mrs. Morrow answered:

"No".

She never gave any reason why she signed the note. Her testimony related entirely to her reason for signing the mortgage.

The note showed on its face that it was past due and the Plaintiff-Appellant testified to the offsets against the note. Upon the pleadings and from the evidence so introduced the Court made and entered Findings of Fact, finding the due execution and delivery of the note and that the note was "made, executed and delivered by the Defendant C. A. Butcher for a valuable consideration", and that the said note was made, executed and delivered by the said Defendant Alberta G. Morrow without consideration (this Finding notwithstanding the fact that the Answer admitted that the note was delivered by the Defendants for a valuable consideration) (Finding No. II, R. 174).

The Court further found Finding No. IX that the only portion of the mortgaged chattels then in existence consisted of some spoiled ensilage which was worthless and that the foreclosure of the mortgage would be a useless formality (R. 178).

By Findings Nos. XI and XIII (R. 179) the Court found against the contention of the defendants that the Defendant Butcher was induced to enter into the contract upon which his counterclaim was based by any fraud on the part of the Plaintiff and that the

Defendant did not make the representations as an inducement for the execution of the contract charged in the counterclaim and further found that the Defendant Butcher was not damaged by any action of the Plaintiff in removing the cattle from the feed lot (R. 179-180).

Upon the Findings so entered and the Conclusions of Law based thereon the Court entered judgment in favor of the Appellant against the Defendant Butcher for the sum of $6,258.00 with interest and attorneys' fees and further entered a judgment that the action insofar as it affects the Defendant Alberta G. Morrow was dismissed (R. 33 and 34).

From the portion of the judgment directing dismissal against the Defendant Alberta G. Morrow this appeal is taken (R. 35).

SPECIFICATIONS OF ERROR.

Specification No. 1.

The trial Court erred in granting the Motion of the Appellee Morrow to dismiss the action as to her.

Specification No. 2.

The trial Court erred in making and entering that portion of Finding of Fact No. II which reads as follows:

> "That said note, was made, executed and delivered by the said defendant Alberta G. Morrow without consideration;"

for the reason that the Complaint alleges and the Answer of the Defendants admits and the undisputed evidence discloses that the note was delivered for a valuable consideration.

Specification No. 3.

The trial Court erred in making and entering that portion of the Judgment entered in said District Court which reads as follows:

> "That the above entitled action insofar as it affects the defendant Alberta G. Morrow be and the same is hereby dismissed."

upon the ground that the portion of said Judgment appealed from is contrary to the law and the evidence for the following reasons:

The Pleadings admit that the note sued upon was delivered by the Defendants for a valuable consideration; that the evidence discloses that there was a consideration for the signing of the note by the Appellee Alberta G. Morrow for the reason that the law imports such a consideration and there was an actual consideration consisting of a detriment to the obligee in that he loaned the Defendant Butcher $7300.00 because of the signature of the Appellee Morrow upon said note; that no consideration is necessary to authorize a recovery against an accommodation maker.

ARGUMENT.

A. UNDER THE LAW AND THE EVIDENCE IN THE INSTANT CASE THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A LACK OF CONSIDERATION FOR THE PROMISSORY NOTE IN QUESTION AS TO THE APPELLEE, MORROW, AND YET AT THE SAME TIME FINDING THAT THERE WAS A CONSIDERATION TO SUPPORT THE PROMISSORY NOTE AS TO HER CO-MAKER, THE DEFENDANT, YOST.

The trial Court in the amended Findings of Fact found that the promissory note in question was made, executed and delivered by the Defendant, C. A. Butcher, for a valuable consideration. That said note was made, executed and delivered by the Appellee, Alberta G. Morrow, without consideration (Finding II, R. 175-176). The law is well settled in Idaho as well as in every other jurisdiction that where a consideration passes to one co-maker of a promissory note such consideration is sufficient to support the obligation of the other co-maker.

Central Bank of Bingham v. Perkins, 251 Pac. 627, 43 Idaho 310;
American Jurisprudence, p. 946, Sec. 250;
10 *Corpus Juris Secundum,* p. 600, Sec. 144.

Under the evidence in the instant case the rule above stated applies. Plaintiff in his complaint alleged (R. 3, 4) and Defendants in the answer admitted (R. 18) the execution and delivery for a valuable consideration of the promissory note in question. At the trial the execution of the note by both parties was again admitted (R. 45). It is undisputed in the evidence that two checks, one in the amount of $6,500.00 and another in the amount of $800.00, drawn by the Plain-

tiff in favor of the Defendant, C. A. Butcher, were delivered to the Defendant and by him negotiated (R. 43-47). It is furthermore undisputed that the amount of these checks was the amount of the promissory note in question and that they represented the consideration for the note. The record therefore discloses that the promissory note in question was signed by the Defendant, Butcher, and the Appellee, Morrow, and that the note was supported by a consideration being the exact sum of money shown on the face of the note which was paid by the Plaintiff to the Defendant, Butcher. Nowhere in the record is there any evidence to support any possible defense to this situation on the part of either the Defendant, Butcher, or the Appellee, Morrow. The Appellee, Morrow, testified (R. 136-137) that she was asked to sign the *mortgage* because she owned the property where the feed was raised. She further testified (R. 137) that she did not receive any money from Mr. Yost. It might appear at first glance that this evidence was introduced to show fraud in the procurement of Mrs. Morrow's signature on the *note*. Close inspection, however, discloses that her testimony related to the mortgage rather than to the note. Furthermore, Mrs. Morrow did, in fact, own the land and the procurement of her signature on the mortgage for that purpose would certainly be a legitimate reason for asking her to sign the mortgage. Nowhere in the record does she try to explain away her signature on the note. She did not testify as to her signature on the note or as to why she signed it and there is certainly no evidence in the record or any

evidence from which an inference could be drawn that there was any misrepresentation as to the legal effect of the note or any promise of forbearance to sue on the note in the event of a default. The record, therefore, further discloses that the Appellee, Morrow, signed the note and that there was no fraudulent inducement for the procurement of her signature. Furthermore, fraud to induce her execution and delivery of the note is not pleaded nor is there any finding by the Court that there was fraud.

From the evidence disclosed in the record it appears, therefore, that the Appellee, Morrow, as comaker of the note was at least an accommodation maker. That being the case grouped with the fact that admittedly a consideration passed to the Defendant, Butcher, from the Plaintiff, Yost, gives rise to a situation where under the Law of the State of Idaho and under the Negotiable Instruments Law generally, the defense of lack of consideration to the accommodation maker cannot be raised. Section 27-206 of the Idaho Code (1947) provides as follows:

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

The language of the above quoted statute is identical to Section 29 of the Uniform Negotiable Instru-

ments Law. The Idaho statute as well as the Uniform Act have been construed to mean that it is sufficient if a consideration passes to the principal maker of the note and that an accommodation maker is liable thereon. This statute was interpreted by the Supreme Court of Idaho in the case of *Central Bank of Bingham v. Perkins, supra,* wherein the following language is found:

> "Conceding that respondent stands in the shoes of the Citizens' Bank and that any defense appellant could have made to an action by the Citizens' Bank was available against respondent, the fact that the maker received no consideration for the note will not excuse him from having to pay it. He was an accommodation maker; he signed the note without any consideration moving to himself with the intention of lending his credit to the promoters of the mine. The note was given to the bank for the accommodation of the promoters and they received the consideration. That the accommodation maker received no consideration is not a defense to the payment of the note."

The rule as above stated by the Supreme Court of Idaho is consistent with a great weight of authority. The rule with respect to co-makers is stated in 7 *American Jurisprudence,* Bills and Notes, Section 250, page 946, as follows:

> "However, consideration once given for a negotiable instrument is consideration in respect to all parties to it at that time, as well as to all subsequent parties where the consideration moves on the agreement that further security will be

obtained and they sign it having knowledge of such agreement."

A rule is stated to the same effect in 10 *Corpus Juris Secundum,* Section 144, page 600, Bills and Notes, as follows:

"A good consideration moving to one of several joint makers is good and sufficient as to all of them; and, not only does the original consideration moving from the payee to the maker of a bill or note support the contemporaneous undertakings of comakers, but it will sustain the liability of secondary obligors who have contemporaneously affixed their signatures or become such prior to the delivery of the instrument to the payee."

The above quoted rules have been universally followed by the Courts, see:

Seth v. Lew Hing, 15 P. 2d 190, 125 Cal. App. 729;

Farmers' Nat. Bank of Pilger v. Ohman, 199 N.W. 802, 112 Neb. 491;

Stockmens State Bank v. Pollat, 264 N.W. 875;

Bloom v. Pioneer State Bank, 223 P. 750, 75 Colo. 28;

Swanson v. Sanders, 58 N.W. 2d 809, 75 S.D. 40;

Penn. Mut. Life Ins. Co. v. Orr, 252 N.W. 745, 217 Iowa 1022;

Chambers v. Carrese, 299 P. 91.

Dealing now specifically with accommodation makers as distinguished from joint makers we find that the same rule with respect to consideration mov-

ing to one of the makers being sufficient to support the obligation of both makers of the note is stated in 11 *Corpus Juris Secundum,* Bills and Notes, Section 742, page 297, as follows:

> "The consideration for an accommodation signature may consist of a detriment suffered by the payee."

Continuing further at pages 303 and 304, Section 748 that rule is elaborated upon as follows:

> "While the want of consideration moving to the accommodation party is a defense in an action by the accommodated party as shown supra §746, or, in some jurisdictions, where the action is by a transferee after maturity as shown infra this section subdivision a (3) nevertheless, both at common law and under the Negotiable Instruments Act, where the action is by a holder for value and in good faith, it does not constitute a defense and such holder may recover thereon, and this is so, although the holder had knowledge, before the paper was transferred to him, that it was accommodation paper."

This rule likewise is universal in its application and has been followed by the Courts in virtually every jurisdiction wherein the question has been presented.

Willoughby v. Ball, 90 P. 1017, 18 Okl. 535;

Mulany v. Murray, 216 P. 1105, 68 Mont. 245;

Spear v. Ryan, 208 P. 1069, 64 Mont. 145;

Crocker Nat. Bank of San Francisco v. Say, 288 P. 69, 206 Cal. 436;

Moriconi v. Flemming, 271 P. 2d 182 (Cal. App.).

From the foregoing authorities it may be seen that the law is well settled that a consideration passing from the payee to one co-maker is sufficient to support the obligation of the other co-maker of the note. Applying the law as hereinbefore stated to the situation in the instant case it is at once apparent that under the evidence in this case the trial Court erred in finding that there was a lack of consideration with respect to the Appellee, Morrow, and in entering a judgment of dismissal as to the Appellee, Morrow, while expressly finding that the note in question was supported by a good and valuable consideration as to the Defendant, Butcher. The evidence clearly discloses the passing of a sufficient consideration from the Appellant to the Defendant, Butcher, namely the sum of Seventy-three Hundred ($7300.00) Dollars in money. Or stated differently, a detriment suffered by the Appellant to the advantage of the Defendant, Butcher, by the payment of the sum of Seventy-three Hundred ($7300.00) Dollars. Under the well settled law, hereinbefore set forth, the Appellee, Morrow, cannot escape liability on this obligation by reason of lack of any consideration passing to her. While the law may recognize certain defenses that an accommodation maker might plead and prove as a defense to an action on a note by the payee, lack of consideration passing from the payee to the accommodation maker is not a defense. *Corpus Juris Secundum* deals specifically with the question of defenses that may be asserted by a joint maker of a note and concludes that it is no defense that there was no consideration as to

one of the joint makers if there was a consideration to the others. The rule is stated in 10 *Corpus Juris Secundum,* Bills and Notes, Section 625, page 1257, as follows:

> "A plea by one joint maker that the note in suit was without consideration as to him is bad unless it negatives a consideration to a third party with his knowledge or with detriment to the promisee."

We respectfully urge, therefore, that the record does not disclose that the Appellee, Morrow, has established any defense recognized by the law as a valid defense to her obligation as a co-maker of the promissory note in question and that lack of consideration passing from the payee to the accommodation maker is not a defense recognized by the law in an action by the payee against the accommodation maker when there was, in fact, a consideration given to the accommodated party and that the trial Court, therefore, erred in entering a judgment of dismissal against the Appellee, Morrow, while at the same time finding that the note in question was supported by a good and valuable consideration as to her co-maker the Defendant, Butcher.

B. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A LACK OF CONSIDERATION FOR THE PROMISSORY NOTE IN QUESTION AS TO THE APPELLEE MORROW, AND YET AT THE SAME TIME FINDING THAT THERE WAS A CONSIDERATION TO SUPPORT THE PROMISSORY NOTE AS TO HER CO-MAKER, THE DEFENDANT, YOST, INASMUCH AS THE DEFENDANTS IN THEIR ANSWER HAD ADMITTED THE EXECUTION AND DELIVERY OF SAID NOTE FOR A GOOD AND VALUABLE CONSIDERATION.

In his complaint the Plaintiff alleged, among other things, in Paragraph II that:

> ". . . for a valuable consideration the defendants, C. A. Butcher and Alberta G. Morrow . . . made, executed and delivered to the plaintiff their certain promissory note in writing . . ." (R. 3).

By their Answer the Defendants, C. A. Butcher and Alberta G. Morrow, in Paragraph I thereof admitted the allegations contained in the above quote from Paragraph II of Plaintiff's Complaint (R. 18). The law is well settled that a party is bound by the admissions made in his pleadings and that proof of facts so admitted by the pleadings is unnecessary and that such admissions are sufficient to invalidate a verdict or a finding which contradicts them. The law, as above quoted, is recognized in the Federal Courts in the State of Idaho and in all jurisdictions where any utterance thereon can be found:

Order of Railway Conductors v. Jones, 239 P. 882 (Colo.);

Russell v. Dilley, 159 N.W. 189 (Iowa);

Miller v. Advance Transp. Co., 126 Fed. 2d 442;

Commissioner of Internal Revenue v. New York Life Ins. Co., 65 F. 2d 347;

Mary E. Smiley v. John W. Smiley, 269 Pac. 589;

Dressler v. Johnston, 21 P. 2d 969, 131 Cal. App. 690;

Weed v. Idaho Copper Co., 10 P. 2d 613, 51 Idaho 737;

Peterson v. Universal Automobile Ins. Co., 20 P. 2d 1016, 53 Idaho 11;

Liberty Nat. Bank of Weatherford v. Semkoff, 84 P. 2d 438, 184 Okl. 18;

Wasatch Livestock Loan Co. v. Lewis & Sharp, 35 P. 2d 835, 84 Utah 347.

The rule is stated in 71 *Corpus Juris Secundum,* Pleading, Section 59, pages 147, 148, 149, 150, 151, 152, as follows:

"As a general rule, sometimes by virtue of statutory provisions, the parties to an action are judicially concluded and, likewise, under the decisions, are judicially bound by their pleadings therein, and unless withdrawn, altered, or stricken by amendment or otherwise, as discussed infra §64, the allegations, statements, or admissions contained in a pleading are conclusive as against the pleader, and are admissible as against the party making them or his successor in the litigation as proof of the facts which they admit on any subsequent trial of the case, or on the trial of another action, as discussed in Evidence §301 et seq. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings, and that the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action, whether

> or not they are offered as evidence. So admissions in the pleadings may render proof of the admitted facts unnecessary or render proof contradicting them inadmissible, and if countervailing evidence, either through inadvertence or the tacit consent of the parties, is admitted it is entitled to no consideration, as discussed infra §523. The admissions in a pleading may support a finding or a verdict in conformity therewith, or make a case for the jury, or invalidate a verdict or a finding which contradicts them."

It is at once apparent from an examination of the pleadings that the Defendants have by their pleadings specifically admitted the execution and delivery of the note in question for a valuable consideration and a careful examination of the trial pleadings including the cross-complaint of the Defendants discloses that they have not in any other allegation negatived this admission. Although the Defendants did set up certain matters by way of cross-complaint, they did, nevertheless, specifically admit the receipt of the money given as consideration for the promissory note in question and by their cross-complaint acknowledged that the amount paid as sufficient consideration was an offset against their alleged claim. If we concede, therefore, for the sake of argument that the evidence in the record discloses even a suggestion of lack of consideration that, in view of the well settled law with respect to admissions and pleadings, hereinbefore set forth, the trial Court was nevertheless in error in making a finding contrary to the admission in the Defendants' pleading to the effect that the Appellee, Al-

berta G. Morrow, executed and delivered the note in question without consideration.

The reason for the rule above set forth is very apparent and fundamental to the basic rules requiring pleadings. The purpose of requiring pleadings is to apprise each party of the contentions of the other that will be asserted at the trial. The instant case is a classic example of the necessity for the rule. An examination of the evidence in the record discloses a pleading in answer to the suit on the note and mortgage admitting their execution and delivery for a good and valuable consideration and setting up no matter in avoidance. The evidence then discloses an effort to avoid the note and mortgage on the part of the Appellee, Morrow, after having, by her pleading, admitted her execution and delivery of the same for a valuable consideration. Under such circumstances it is difficult even with timely objection to keep evidence out of the record that might tend to prove some defense precluded by the pleading, but nevertheless, harbored in the mind of the Appellee. It is for that reason that the pleadings and admissions thereon will, under the law, prevail over evidence to the contrary that may find its way into the record. It is, furthermore, worthy of mention in passing, that the requirements of Rule 8-C of the Rules of Civil Procedure provides as follows:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud,

> illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

An examination of the Defendants' pleadings discloses that if, and we do not concede this to be true, the Defendants had gotten evidence into the record establishing lack of consideration as to the Appellee, Morrow, or any other defense that insofar as the promissory note is concerned they have not properly pleaded any of the defenses enumerated in Rule 8-C or any other matter in avoidance so as to entitle them to offer proof of those matters and, that in any event, the admissions in their Answer are binding upon them notwithstanding any evidence that might be in the record to the contrary and that they are binding upon the Court in the entry of his findings of fact upon which the judgment of dismissal as against the Appellee, Morrow, was based.

In view of the admissions in the Defendants' pleadings, therefore, it is obvious that regardless of the evidence the Court erred in making its finding of fact to the effect that the Appellee, Morrow, did not receive a consideration for the note and in entering his judgment of dismissal as to the Appellee, Morrow, thereon, and that in view of the admissions in the pleadings

with respect to the promissory note and mortgage that the Court could not have found that the Appellee, Morrow, had established any defense by any matter in avoidance.

C. THE TRIAL COURT MAY NOT DISREGARD POSITIVE UNCONTRADICTED EVIDENCE SUSCEPTIBLE OF CONTRADICTION BY AN AVAILABLE WITNESS.

The law is well settled that a Court may not disregard positive uncontradicted evidence:

Pierstorff v. Gray's Auto Shop, 58 Ida. 438, 73 P. 2d 171;

First Trust & Savings Bank v. Randall, 58 Ida. 705, 89 P. 2d 741;

Idaho Times Publishing Company v. Industrial Accident Board, 63 Ida. 720, 126 P. 2d 573;

In re Odberg's Estate, 67 Ida. 447, 182 P. 2d 945;

Alabama Title & Trust Co. v. Millsap, 71 Fed. 2d 518;

Mutual Life Ins. Co. v. Sargent, 51 Fed. 2d 4;

Gibson v. Southern Pac. Co., 67 Fed. 2d 758;

Weicker v. Bromfield, 34 Fed. 2d 377.

In the instant case the evidence is uncontradicted that the note was made, executed and delivered by the Defendant, Butcher and the Appellee, Morrow. The evidence is positive and is uncontradicted that the Plaintiff paid to one of the co-makers, the Defendant, Butcher, the sum of Seven Thousand Three Hundred ($7,300.00) Dollars in money as a valuable considera-

tion for the execution and delivery of the note in question. Upon that state of the evidence, particularly in view of the fact that no matter was pleaded or proved in avoidance of the note, the trial Court erred in finding that the note was without consideration and in entering a judgment of dismissal as to the Appellee, Morrow.

CONCLUSION.

In conclusion, we wish to point out that the only matter that might constitute a defense in any way, shape or form that has been injected into this Cause is fraud and misrepresentation alleged in the affirmative defense and Cross-Complaint which was, as a matter of fact, pleaded for the purpose of the Defendants' counterclaim and although related to was nevertheless independent of the promissory note here in question. In any event, it is indeed significant that in the findings of fact (Finding XI, R. 179) the Court specifically found the fact to be that the Defendant, Butcher, was not induced to enter into the feeding contract by any fraud on the part of the Plaintiff and Appellant the only issue of fraud injected into the cause by the pleadings and the evidence related to the feeding contract set forth in the Cross-Complaint of the Defendants and the very same Cross-Complaint (R. 21, Paragraph 9) acknowledged the execution and delivery of the promissory note for a valuable consideration and acknowledged that it was and should be a valid offset against the matters

alleged in their Cross-Complaint. Their Cross-Complaint having failed, the execution and delivery of the promissory note for a valuable consideration still stands as admitted by the Defendants.

By reason of the well settled law, as herein set forth, the pleadings and admissions therein contained and the undisputed evidence as well as the finding of fact of the trial Court with respect to the note being support by a valuable consideration with respect to the Defendant, Butcher, and the finding of lack of fraud, we respectfully urge that the trial Court erred in finding that the note was without a valuable consideration with respect to the Appellee, Morrow, and entering a Judgment of Dismissal as to the Appellee, Morrow.

Dated, Weiser, Idaho,
September 10, 1958.

Respectfully submitted,
DONART & DONART,
Attorneys for Appellant.

(Appendix of Exhibits Follows.)

Appendix.

Appendix of Exhibits